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Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1458
No. 79-1459

CHARLES G. RODMAN, as Trustee of the Estate of W. T. Grant Company, Bankrupt, and MORGAN GUARANTY TRUST COMPANY OF NEW YORK,

Petitioners,

—v.—

ALTON RINIER, as Agent for Certain Employees of Bankrupt; Answering Employees of Bankrupt; Local 807-IBT; Retail Clerks International Association; and National Labor Relations Board,

Respondents.

BRIEF OF RESPONDENT ALTON RINIER, AS AGENT FOR CERTAIN EMPLOYEES OF BANKRUPT, IN OPPOSITION TO PETITIONS FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Are employees with contractual rights to severance benefits upon dismissal entitled to receive full severance benefits payable as a first-priority Chapter XI expense of administration where the employees are discharged during the Chapter XI proceeding after rendering beneficial services to the Chapter XI

debtor-in-possession and where there is no formal rejection of the severance contracts during the Chapter XI proceeding?

STATEMENT OF THE CASE

This brief is submitted on behalf of Alton L. Rinier, as common agent for a number of non-union employees of W. T. Grant Company ("Grant") in or about Ohio who were dismissed during the superseded Chapter XI proceeding in this case which lasted from October 2, 1975 to April 13, 1976. The legal issues involved in this case affect all former employees of Grant similarly situated and not represented by counsel.

The relevant facts are generally set forth in the opinions of the lower courts.* However, clarification is necessary in light of some of the contentions in the petitions for a writ of certiorari to the United States Court of Appeals for the Second Circuit of Charles G. Rodman, as Trustee of the Estate of Grant, Bankrupt (the "Trustee") and Morgan Guaranty Trust Company of New York, acting for itself and twenty-five (25) other banks ("Morgan Guaranty").

Prior to the commencement of the Chapter XI case, to induce persons to accept employment, Grant offered to potential employees a compensation package which included the payment of severance benefits, the amount dependent upon length of service and certain other conditions. Severance pay is due and payable only upon termination of employment for both union and non-union employees.

In accordance with the policies and procedures adopted by Grant and the applicable provisions of the collective bargaining agreements, as an employee's period of employment increased, the amount of his potential severance benefits for involuntary termination also increased. Nevertheless, the earning and vesting of severance benefits took place only upon the occurrence of an event: the involuntary dismissal of an employee.

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* See Petitioners' Joint Appendix I-III.

The pre-Chapter XI policies and procedures of Grant as to severance benefits, constituting executory contracts, intentionally were not rejected by Grant in its capacity as a debtor-in-possession pursuant to Section 313(1) of the Bankruptcy Act (the "Act"), 11 U.S.C. § 713(1), and Rule 11-53 of the Rules of Bankruptcy Procedure.

Subsequent to the filing of the Chapter XI petition, the debtor-in-possession apprised its employees and gave notice to all store managers that consideration of payments of severance benefits to discharged or terminated employees would be deferred because of the pendency of the Chapter XI case, and that no such benefits would be paid pending the development of a plan therefor and the approval thereof by the Bankruptcy Court. Without apparent authority and after many employees had been let go, the bankrupt's management on January 5, 1976 erroneously advised store managers that the Bankruptcy Court had ordered that the Company was "prohibited" from paying vacation and severance pay, adding its "hope" that such payments would be made in 1976.

The record is unclear, however, as to whether the first notice was given before or after January 1, 1976. Thus, during the early phases of the debtor-in-possession's retail store contraction and liquidation program, the employees were not alerted that the pre-Chapter XI policies, procedures and agreements as to severance benefits might be considered ineffective and might not be adopted by the debtor-in-possession.

On the contrary, the debtor-in-possession filed an application, dated April 8, 1976, for authorization to make payments to terminated employees of vacation and severance benefits as expenses of administration of the Chapter XI case, in accordance with Section 64a(1) of the Act, 11 U.S.C. § 104a(1), *Straus-Duparquet, Inc. v. Local Union No. 3, IBEW*, 386 F.2d 649 (2d Cir. 1967) and the Bankruptcy Court's decision affirmed in *In re Unishops, Inc.*, 553 F.2d 305 (2d Cir. 1977).

On October 28, 1975, Grant obtained an order authorizing it to pay severance benefits to John Sundman, a former Grant

senior executive, pursuant to a pre-petition agreement. The severance benefits were measured by six (6) months' salary.

In none of the decisions below did the Bankruptcy Judge, the District Judge or the Circuit Court Judges find that there was an express assumption by Grant of the severance benefits. Nevertheless, the Petitioner-Trustee seeks to characterize the liability of the debtor-in-possession as grounded in the assumption of the severance benefit agreements. *

Ironically, the Trustee proclaims his intention to "avoid inequity and prejudice to long-term creditors" ** as the reason for pressing in four (4) federal courts to reduce the severance benefits by millions of dollars. Petitioner Morgan Guaranty applauds the Trustee's position as "generous." ***

What is unclear from the petitions, however, is the background fact that in 1978 a limited fund was established for pro-rata payment of all unsecured debts of the estate other than the debts to the bank creditors represented by Morgan Guaranty, which group agreed to establish a much larger fund for the satisfaction of its debts. The practical effect of the decisions below was to permit payment of severance benefits from the bank group fund in the amount of approximately $11,384,000. If the Trustee and the bank group prevail in this case, the bank creditors will reduce this payment by approximately $2,000,000 and general creditors will receive less on their claims.

REASONS FOR DENYING THE WRIT

The Second Circuit considered two dispositive issues on appeal: (1) whether Grant, as debtor-in-possession, rejected the executory contracts of its employees; and (2) whether the sever-

* Trustee's petition at 7-8, 11-15.

** Trustee's petition at 7.

*** Morgan Guaranty's petition at 6.

ance pay claims arising from the Grant employment agreements are entitled to first priority as costs and expenses of administration. By answering the first question in the affirmative and the second in the negative, the Second Circuit followed the precedent it had set in *Straus-Duparquet, supra,* and *Unishops, supra.*

Although the petitions for a writ of certiorari allege that the Second Circuit decision is in direct conflict with the position taken by other circuit courts on each issue, each case cited by petitioners is distinguishable from this case on important legal and factual grounds. Thus, the Second Circuit decision does not stand in conflict with other circuits. In addition, the decision below is consistent with the Bankruptcy Act's terms and its fundamental purpose to apply assets equitably. Accordingly, the writ applied for herein should not be granted.

I

THE DETERMINATION THAT THE DEBTOR-IN-POSSESSION IS BOUND BY THE SEVERANCE AGREEMENTS DOES NOT CREATE A CONFLICT WITH THE DECISIONS OF OTHER COURTS OF APPEALS

The Second Circuit, citing *Unishops*, *supra*, found that Grant, as a Chapter XI debtor-in-possession, was bound by its employee severance pay agreements since it received benefits thereunder and it did not expressly reject the agreements pursuant to § 313(1) of the Act.*

No decision in any other circuit is directly in conflict with this holding. In *Local Joint Executive Board, AFL-CIO v. Hotel Circle, Inc.*, 613 F.2d 210 (9th Cir. 1980), cited extensively in the Trustee's petition for its alleged conflict with the Second Circuit's holding herein, the Court of Appeals for the Ninth

* Petitioners' Joint Appendix I.

Circuit expressly limited its holding so as not to impinge on the issues raised in the *Grant* case.

In the *Hotel Circle* case, the receiver negotiated a proposed sale of a hotel conditioned on the purchaser taking title clear of any existing collective bargaining agreement. Despite the receiver's prior acceptance without court approval of the collective bargaining agreement in question, the Ninth Circuit sanctioned the rejection of the collective bargaining agreement, holding the receiver lacked the power to preclude court action to reject an executory contract. When faced with the apparent conflict with the Third Circuit's holding in *In re Public Ledger, Inc.*, 161 F.2d 762 (3d Cir. 1947), which stated that a receiver or trustee has authority to assume a labor agreement without seeking court approval, the Ninth Circuit expressly narrowed its holding to the case's particular facts, stating:

> We have not found any cases holding that a receiver or trustee had authority to adopt a *long-term collective bargaining agreement that actually bound the debtor's estate beyond the term of his trust*, and, like the district court, we find the reasoning against such authority *"even more persuasive if the assumption of an executory contract will bind the estate in the future rather than merely establish a priority as an administrative expense." Local Joint Executive Board, AFL-CIO v. Hotel Circle, Inc., supra*, 419 F. Supp. at 788.

613 F.2d at 217 (emphasis added).

Thus, *Hotel Circle* and *Grant* are compatible, not in conflict. The adjudication in bankruptcy and consequent discontinuation of operations (including dismissal of all store employees) removes the *Grant* facts from the purview of *Hotel Circle*. The Grant debtor-in-possession never expressly assumed the severance agreements, as no court authorization was obtained. But the debtor-in-possession did receive benefits from the employees during the Chapter XI case, and it was prepared to acknowledge its obligation for severance pay. Recognition of the executory severance agreements in the *Grant* case serves merely to

establish a priority of the severance claims as an administrative expense.

The Trustee-Petitioner cites four other cases to support his allegations of conflict among the circuits as to the rejection or assumption of executory contracts without prior court approval, *In re Gulfco Investment Corp.*, 520 F.2d 741 (10th Cir. 1975), *In re Maryvale Community Hospital, Inc.*, 456 F.2d 414 (9th Cir. 1972), *cert. denied*, 409 U.S. 879 (1972), *In re American National Trust*, 426 F.2d 1059 (7th Cir. 1970), and *Texas Importing Co. v. Banco Popular de Puerto Rico*, 360 F.2d 582 (5th Cir. 1966).

However, the Trustee's citations are misleading, since he has misstated the issue herein as involving the rejection or assumption of executory contracts by a trustee. None of the *Grant* courts below found that the debtor-in-possession assumed the severance pay agreements. Rather, they found that the debtor-in-possession received substantial benefits from employees at a time when the severance executory contracts were still in effect.

Assuming, *arguendo*, that the *Grant* opinions below could be construed to have held that the debtor-in-possession assumed the severance pay agreements, a cursory examination of the Trustee's cases reveals the illusory nature of these alleged conflicts. Each case is a corporate reorganization under Chapter X of the Act, 11 U.S.C. § 501 et seq. The petition in the *Grant* case was originally filed under Chapter XI of the Act, 11 U.S.C. § 701 et seq. This difference itself renders the holdings of the cited Chapter X cases irrelevant to the severance pay issues in the *Grant* proceeding.

Chapters X and XI of the Bankruptcy Act were specifically devised to afford two different, legally mutually-exclusive procedural paths to financial rehabilitation. *SEC v. American Trailer Rentals Co.*, 379 U.S. 594 (1965). A major procedural distinction between the two Chapters is the requirement of the appointment of a disinterested trustee in Chapter X rather than the authorization of the debtor to continue in possession of its property in Chapter XI. *Compare* Section 156, 11 U.S.C. § 556,

with Section 342, 11 U.S.C. § 742. The appointment of a disinterested trustee in Chapter X proceedings implements congressional intent to "afford greater protection to creditors and stockholders by providing *greater judicial control over the entire proceedings* . . . ." *SEC v. American Trailer, supra* at 604 (emphasis added). *See Banco Popular, supra* at 584. Hence, any determination in a Chapter X proceeding concerning the power of the trustee to reject or assume executory contracts without the express authorization of the court is of little relevance to an analogous situation in a Chapter XI proceeding, in light of the recognized need for "greater judicial control" over a Chapter X proceeding.

Other significant legal and factual distinctions preclude the application of the cited Chapter X cases to the issue at hand. In neither *Gulfco* nor *Maryvale* was there a scintilla of language or implication supporting the Trustee's characterization of the holding of these cases, *i.e.*, "the assumption of executory contracts which results in the creation of first priority costs and expenses of administration . . . requires an express order of the Bankruptcy Court."* *Gulfco* holds merely that the trustee may have a reasonable time to determine whether to assume or reject an executory contract. The *Gulfco* court does not offer an opinion as to what happens when a contract is itself substantially performed by one of the contracting parties and the other already has received the fruits of the performance. *Maryvale* states simply that the power to *reject* the debtor's executory contracts lies solely in the Bankruptcy Court, not in the receiver or trustee. *Maryvale* is fully consonant with the respondent's view that in a Chapter XI proceeding, the debtor-in-possession cannot reject the labor agreements in question without the express authority of the Bankruptcy Court. *Maryvale* does not purport to preclude the debtor-in-possession from receiving benefits under an executory contract of the debtor and correspondingly becoming liable for obligations thereunder.

Another factual distinction serves to remove the instant case from the scope of the four cases cited by the Trustee. In each

* Trustee's petition at 9.

case a party to the executory contract sought to *prevent* the court from *expresssly rejecting* the executory contract, alleging that the court was estopped from so doing by prior acts of the trustee. On the other hand, the Grant Trustee seeks retroactively to deny the debtor-in-possession's intentions and actions respecting the severance agreements where *no application was made to the Court for explicit rejection of the executory contracts.**

Therefore, these cases may be reconciled by incorporating this distinction into the holdings, to wit: a trustee or receiver may not by his behavior preclude the Bankruptcy Court from *expressly* rejecting or assuming an executory contract. This allows the Bankruptcy Court to expressly reject an executory contract despite prior actions by the trustee in conformance with the contract, yet provides that the bankrupt estate may remain responsible for an executory contract where no action is taken by the Court to expressly reject the contract and the bankruptcy fiduciary has received benefits thereunder. This holding is consonant with all cases cited by the Trustee, the *Grant* case, and the statutory language of Section 313(1) of the Act.

II

THE CLASSIFICATION OF SEVERANCE PAY AS AN ADMINISTRATION EXPENSE DOES NOT CREATE A CONFLICT WITH THE DECISIONS OF OTHER COURTS OF APPEALS

In the second issue before the Second Circuit, the Court reaffirmed its decision in *Straus-Duparquet, supra*, holding that severance pay is compensation for termination of employment, not earned from day to day and, unlike wages, does not accrue. Therefore, severance pay owed to those employees whose jobs were terminated during the Chapter XI proceeding is entitled to

* In fact, application to pay employees under the severance agreements was made by the debtor-in-possession to the Bankruptcy Court on April 8, 1976 and was pending at the time of the adjudication in bankruptcy.

first priority as a cost and expense of administration pursuant to Section 64a(1) of the Act.

No case exists in any circuit in direct conflict with this holding. The factual circumstances of *In re Mammoth Mart, Inc.*, 536 F.2d 950 (1st Cir. 1976), cited by the Trustee-Petitioner as having been rejected by the Second Circuit's decision herein, differ significantly from those in the case at bar. When the narrow holding in *Mammoth Mart* is separated from the expansive dicta of the First Circuit therein, the result is that there is no genuine conflict between the holdings of the First Circuit in *Mammoth Mart* and the Second Circuit in *Grant*.

The First Circuit in *Mammoth Mart* said that

> whether a claim for severance pay based upon an unrejected contract with the debtor and arising from a chapter XI discharge will be entitled to § 64(a)(1) priority will depend upon the extent to which the consideration supporting the claim was supplied during the reorganization.

536 F.2d at 955. The Court then proceeded to analyze whether consideration was supplied during the reorganization.

Central to the First Circuit's reasoning is the threshold issue of the mere *existence* of some consideration furnished during the reorganization to support the first-priority severance pay claim. As the First Circuit found that the debtor-in-possession discharged the employees in question pursuant to an order entered only eleven (11) days after the filing of the Chapter XI petition and the employees already had received four (4) weeks' severance pay as an expense of administration, it concluded that no consideration was supplied to the debtor-in-possession. In this connection, *Mammoth Mart* is totally consistent with *Unishops* and *Grant*, in which cases it was found, contrary to *Mammoth Mart*, that the debtor-in-possession had received significant benefits from the parties claiming severance payments. Any further discussion of the First Circuit as to the mechanics of computing severance pay where such consideration is supplied is dicta, *i.e.*, unnecessary to the court's decision and therefore not binding authority. *See, e.g., Kastigar v. U.S.*, 406 U.S. 441 (1972). Such dicta should not serve as the foundation for a conflict among the circuit courts sufficient to support the petitions for a writ of certiorari in this matter.

Public Ledger, *supra*, the only other circuit court case cited by the Trustee for an alleged conflict with the case at bar on the priority claim issue, is distinguishable from the instant matter on several grounds.*

Public Ledger was a Chapter X proceeding under the Act, unlike the instant Chapter XI proceeding. A basic principle of bankruptcy jurisprudence is that the Act shall be construed in light of congressional intent. *See, e.g., Reading Company v. Brown*, 391 U.S. 471 (1968). Further, it is undisputed that Chapters X and XI were enacted to serve two separate and distinct purposes within the framework of corporate rehabilitation. *See, e.g., SEC v. American Trailer*, *supra*; *In re Peoples Loan & Inv. Co.*, 410 F.2d 851 (8th Cir. 1969). Despite the fact that Section 64a(1) applies to bankruptcy proceedings under both Chapters X and XI by virtue of Sections 102 and 302 of the Act, 11 U.S.C. §§ 502 and 702, Section 64a(1) must be construed to implement the distinct congressional intent of each chapter in which it is applied. Thus, the Third Circuit's construction of "expenses of administration" in the Chapter X proceeding of *Public Ledger* cannot be said to conflict with the different construction rendered by the Second Circuit in the Chapter XI proceeding herein.

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* In fact, in a case with issues virtually identical to the case at bar, on May 3, 1976 the Supreme Court denied certiorari to the Second Circuit in *In re The Bohack Corp.*, 535 F.2d 1240 (2d Cir. 1975), *cert. denied*, 425 U.S. 966 (1976), *rehearing denied*, 429 U.S. 875 (1976), despite the then petitioner's claim of an alleged conflict with *Public Ledger*, *supra* and the Bankruptcy Court's decision in *In re Mammoth Mart, Inc.*, 1 Bankr. Ct. Dec. 909 (D. Mass. 1975). After *Mammoth Mart* was affirmed by the First Circuit on June 18, 1976, the Bohack debtor and the creditors' committee submitted a motion for leave to file and petition for rehearing of order denying certiorari, which motion and petition emphasized the alleged conflict between the First and Second Circuits in *Mammoth Mart* and *Straus-Duparquet*, respectively. The Supreme Court denied the motion and petition on October 4, 1976 at 429 U.S. 875 (1976).

More importantly the § 64a(1) which the Third Circuit in *Public Ledger* construed in 1947 is not the same statute construed by the Second Circuit herein. Section 64a(1) has been amended several times since 1947. Respondent submits that the 1952 and 1967 amendments of § 64a(1) are of such legal significance that any construction of § 64a(1) prior to 1952 is of dubious precedential value and cannot be the basis of a conflict among the circuits.

The legal effect of the 1952 and 1967 amendments was to create a super-priority for expenses of administration incurred in an ensuing bankruptcy proceeding over unpaid expenses of administration incurred in a superseded reorganization proceeding. *Public Ledger* was a Chapter VII bankruptcy which superseded an unsuccessful Chapter X proceeding. The considerations of the Third Circuit in *Public Ledger* differed from those of the Second Circuit herein, given the Third Circuit's knowledge that any expenses of administration of the superseded Chapter X proceeding would be shared *pari passu* with the expenses of the ongoing Chapter VII proceeding.* It is evident that the Third Circuit's construction of § 64a(1) in 1947 cannot conflict with the Second Circuit's construction of a different statute thirty-three years later.

III

THE DECISION BELOW IS CONSISTENT WITH THE BANKRUPTCY ACT'S TERMS AND ITS FUNDAMENTAL PURPOSE TO APPLY ASSETS EQUITABLY

The characterization of severance benefits as priority claims, payable as costs and expenses of administration, is in accordance with the express standards of the Bankruptcy Act and the

* *See* S. Rep. No. 1395, 82d Cong., 2d Sess. 4 (1952), which provides as an explanation for the 1952 amendment to Section 64a(1) the concern that "[u]nless provision is made for payment of the costs and expenses necessary to liquidate, administer and close the estate in the ensuing bankruptcy proceeding, ahead of the prior incurred and unpaid administration costs and expenses, there is always danger of a breakdown of administration."

Act's fundamental purpose to apply assets equitably. Section 64a(1) provides that first priority be given to "the costs and expenses of administration . . . ." The determination of whether a particular claim is a cost or expense of administration is properly left for judicial interpretation by virtue of the vicissitudes and complexities of bankruptcy case administrations.

The Second Circuit in *Straus-Duparquet* determined that severance pay is

> a form of compensation for the termination of the employment relation . . . primarily to alleviate the consequent need for economic readjustment but also to recompense [the employee] for certain losses attributable to the dismissal.

386 F.2d at 651. By this self-evident determination the Second Circuit in *Grant* has accorded priority status to one hundred (100%) percent of the severance benefits pursuant to the express terms of Section 64a(1).

Petitioner Morgan Guaranty, in attempting to challenge the meaning given by the courts to § 64a(1), misconstrues the scope of "costs and expenses of administration." Petitioner Morgan Guaranty cites *Pomper v. U. S.*, 196 F.2d 211 (2d Cir. 1952), which held that federal unemployment taxes based on wage payments paid to the federal government at the end of the calendar year are generally accorded first-priority treatment only to the extent that the underlying wages are for post-filing services. Petitioner Morgan Guaranty then states that there is no reason to treat severance pay any differently.

Taxes accrue on a day-to-day basis. In the area of withholding taxes, the Internal Revenue Service has a direct interest, however, in the taxes as they accrue even in advance of the payment date. No action by the employer can preclude its payment upon the mere passage of time. *See* Int. Rev. Code of 1954, § 7501, 26 U.S.C. § 7501.

On the other hand, severance benefits do not accrue and claims therefor are not so neatly capable of measurement as accrued taxes. *Straus-Duparquet*, *supra*. The employee has no right to any payments until the termination of his employment, an act solely within the discretion of the employer. Even upon termination of employment, circumstances may exist which preclude the payment of severance benefits, *e.g.*, voluntary termination or termination for cause.

The Ninth Circuit in *Pomper* explained:

> The employer's tax at any given time in the taxable period can be accurately computed . . . . The mere fact that the tax is not due until the year's end does not detract from the fact that it is incurred in a readily ascertainable amount as the wages are paid out. *Indeed, if the employer sells out his business to a new employer at any point in the year, he will still be responsible for the tax of 3% on all wages paid out by him before the sale* . . . .

196 F.2d at 213 (emphasis added).

The allocation in *Pomper* is comparable to allocation of accrued vacation pay benefits. In *Straus-Duparquet* the Court held vacation pay benefits also will accrue and may be computed in a manner similar to tax payments in *Pomper*. But the Second Circuit in *Straus-Duparquet* observed that severance pay is different from vacation pay, which is part of an employee's compensation for services rendered. Rather, severance pay is compensation for termination of employment.

On the other hand, the District Court in *Grant* found that "the severance agreements were in no sense intended to be compensation for services rendered or to be rendered by Grant employees."* Also, the Bankruptcy Court below found that the Grant compensation package included "the *prospect* of receiving severance pay benefits in the event of dismissal . . . ." Until such dismissal an employee had only "*potential* severance pay benefits." (Emphasis added).**

* Petitioners' Joint Appendix II at 15a.

** Petitioners' Joint Appendix III at 23a.

Thus, severance benefits accrue one hundred (100%) percent upon termination and are entitled to priority as an administrative expense.

Assuming *arguendo* the correctness of Petitioner Morgan Guaranty's contention that severance benefits accrue partially prior to the filing of a petition in bankruptcy, this does not necessarily mandate a different result as to priority.

Bankruptcy proceedings themselves are equitable in their character and are to be administered in accordance with the general principles and practices of equity. *See*, *e.g.*, *Pepper v. Litton*, 308 U.S. 295 (1939); *Local Loan Co. v. Hunt*, 292 U.S. 234, 240 (1934). In the exercise of its equitable powers, the court may award priority status for severance benefits to reflect benefits conferred upon a debtor's estate. *See American Anthracite & Bituminous Coal Corp. v. Leonardo Arrivabene, S.A.*, 280 F.2d 119 (2d Cir. 1960); *Unishops*, *supra*.

The District Court herein found that

> had Grant been forced to terminate all its employees upon entering Chapter XI and thereafter recruit a new work force even its short-lived Chapter XI attempt would have been virtually impossible. Accordingly, in light of these benefits the severance claims of the employees were entitled to a priority as a cost and expense of administration. *Unishops*, *supra*, 553 F.2d 308.*

The award by the courts below of priority status to one hundred (100%) percent of severance pay was in recognition of the important benefits rendered Grant in their efforts to rehabilitate an ailing debtor. Had the Trustee attempted to assess the benefits conferred upon the debtor estate by the "reasonable value" standard under *American Anthracite*, *supra*, he may have found value in excess of the severance pay provisions delineated in the Grant Store Manual.

Petitioner Morgan Guaranty further argues that when applying its equitable discretion, the Court should consider the "possible crippling burden" of the Second Circuit's decision on a

* Petitioners' Joint Appendix III at 17a.

company needing the protection of the bankruptcy court. The Supreme Court has determined, however, that the burden of the Chapter XI operation of a debtor-in-possession upon innocent parties is of equal importance and may require the equitable award of priority claims even in excess of the assets of the debtor. *See Reading Company v. Brown, supra.*

Despite the Supreme Court's sanction of extensive priority payments where equitably justified, it seems unlikely that first-priority recognition of severance benefits would create the pervasive debilitating effect upon reorganization proceedings foreseen by petitioners. Where they exist at all, severance agreements arise in larger corporate entities. In many cases provision is made for the payment of the benefits from union funds. Even in the unique circumstances of Grant, the largest corporate bankrupt in history with several hundreds of millions of dollars received and administered by the Trustee and a large non-unionized labor force, the payment of severance benefits as a first-priority expense would have had no significant impact upon the Chapter XI administration.

Equity should recognize that the distinction between the treatment accorded the terminated employees and the consortium of banks headed by Morgan Guaranty in the instant bankruptcy proceeding results essentially from the greater bargaining power which the banks employed during their negotiations with Grant prior to bankruptcy. As a result, the banks have the luxury of satisfying their secured claims against the debtor from a fund of hundreds of millions of dollars set aside in 1978 for the satisfaction of bank claims, certain other claims, and costs and expenses of administration of the bankruptcy proceedings. To the extent they are relegated to the status of general unsecured creditors, the terminated employees may look only to the $35,000,000 residual fund.

The severance benefits each employee knew would accrue upon the termination of his employment represented his "security" retained for continuing his employment, just as the security interest which the banks retained represented security for the repayment of funds they advanced. Not only did the security of severance benefits induce the employees' initial acceptance of employment, but it also induced their continued employment with the debtor-in-possession during Chapter XI proceedings. The debtor-in-possession was ready and willing to honor the commitment to the employees. The Trustee and the banks are not.

Thus, the decision below is fully consistent with the express terms of § 64a(1) of the Bankruptcy Act and the Act's fundamental purpose to apply assets equitably.

CONCLUSION

It is respectfully submitted that the petitions for a writ of certiorari should be denied.

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Respectfully submitted,

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